

BEFORE THE SHORELINE HEARINGS BOARD  
OF THE STATE OF WASHINGTON

HARRY PICTON,	)	
	)	
Appellant,	)	SHB No. 86-58
	)	
v.	)	FINAL FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND
PIERCE COUNTY and STATE OF	)	ORDER
WASHINGTON, DEPARTMENT OF	)	
ECOLOGY,	)	
	)	
Respondents.	)	

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This matter, the request for review of a shoreline variance permit granted by Pierce County to Harry Picton and subsequently denied by the Department of Ecology, came on for hearing before the Shorelines Hearing Board: Wick Dufford (presiding), Judith A. Bendor, Annette McGee, Dennis McLerran, and Nancy Burnett.

Harry Picton appeared by his attorney, Thomas Krilich. State of Washington, Department of Ecology, appeared by Robert Costello, Assistant Attorney General. Pierce County was represented by Stephen R. Shelton, Deputy Prosecuting Attorney.

The hearing was conducted in the Board's office in Lacey, Washington, on November 17, 1987.

Witnesses were sworn and testified. Exhibits were examined. Eugene Barker and Associates recorded the proceedings. From the

1 testimony heard and the exhibits examined, the Shorelines Hearings  
2 Board comes to these

3 FINDINGS OF FACT

4 I

5 This matter arises on Day Island in Pierce County.

6 II

7 The area involved is at the southern end of the island where the  
8 land narrows into a spit barely wide enough to support a road and  
9 homes.

10 To the west is the Puget Sound. To the east is a long, slender  
11 tidal lagoon which separates the island from the mainland.

12 III

13 Day Island Boulevard West runs down the western side of the spit  
14 immediately adjacent to rip-rap on the bank. Fronting on the east  
15 side of the road are 15 to 20 houses, crowded close to one another,  
16 with their back ends supported on pilings or fill in the lagoon. As  
17 the spit thins down, little or no room is left for yards or patios.

18 Decking and floats have been built on the lagoon at the rear of  
19 some homes and several have boathouses there.

20 IV

21 Day Island Boulevard West is itself narrow as it runs down the  
22 spit, allowing traffic in only one direction at a time. There is  
23 limited room for parking along it. The passage is congested.

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26 FINAL FINDINGS OF FACT  
27 CONCLUSIONS OF LAW AND ORDER (2)  
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V

Except for the rip-rapping along the bank, the waterfront on the west side of the road is largely undeveloped open shore. At low tide, a small beach appears at the foot of the rip-rap, giving way to tidelands of rock and mud.

VI

The development in question is a sundeck built on the west side of the road, extending from the rip-rapping into the tidelands.

The site is in the mid-portion of the spit on property owned by Richard Gappa at 2435 Day Island Boulevard West. The dry land portion of this property is almost totally occupied by Gappa's house and the road.

VII

Harry Picton is a tenant of Richard Gappa who has lived at Gappa's house on the spit since 1980. In the summer of 1982, Picton and another tenant built the sundeck across the road in front of the house. No shorelines permits were obtained for the project, although it had Mr. Gappa's approval.

VIII

The Gappa property is approximately 25 feet wide (north-south), but includes tidelands on the west side of the road.

The sundeck was built so that the landward end rests on the rip-rap next to the road. The structure extends about 23 feet waterward and is about 16 feet wide. The southern edge is inches from

1 the property line.

2 The piling construction supports the structure some eight-plus  
3 feet above the beach at its waterward end.

4 IX

5 The extreme high water mark lies along the face of the rip-rap.  
6 It is undisputed that the sundeck projects into the tidelands beyond  
7 this line.

8 X

9 The Pierce County Shoreline Master Program (PCSMP) was approved  
10 and adopted as part of the State Master Program on April 4, 1975. WAC  
11 173-19-350.

12 The general regulations of the PCSMP for residential development  
13 provide that "all residential structures shall be landward of the  
14 extreme high water mark." PCSMP Section 65.62.030(A)(5).

15 XI

16 In 1984, Picton applied for a Shoreline Variance permit to  
17 authorize the sundeck after-the-fact. On January 7, 1985, the Pierce  
18 County Hearing Examiner approved the variance subject to conditions.  
19 On September 3, 1986, the Pierce County Council affirmed the hearing  
20 examiner's decision. On November 14, 1986, the Washington Department  
21 of Ecology denied the variance permit, based on the following:

- 22 1) The deck, as a residential structure, is  
23 inconsistent with the county's master program,  
24 which states: "All residential structures shall be  
25 landward of the extreme high water mark."

2) The deck does not meet the variance criteria, set forth both by the department and the county.

3) The Shoreline Management Act does not allow the issuance of a variance for a prohibited use. We refer you to the definition of a variance, specifically that its purpose is to "grant relief from the specific build, dimensional, or performance standards."

## XII

The Day Island spit is very densely developed. The homes are packed together like sardines in a can.

The homes face the west because that is the desirable view--an expanse of open water with wooded shores in the distance. The prospect on the east side is not particularly inviting. Railroad tracks lie immediately across the narrow lagoon, giving way immediately to a sort of wall formed by the high upland bank.

The waterfront on the west side can be enjoyed from the rip-rap bulkhead or from the beach when the tide is out. However, the physical layout is not conducive to extensive sun bathing or outdoor entertaining. Landward of the extreme high water mark, space for such activity is at a premium.

## XIII

The purpose of Picton's project was to create an area for outdoor lounging and entertaining. Initially, the structure included a built-in brick barbecue next to the road, but the Pierce County Hearing Examiner required this to be removed in the interests of safety.

The project was not built as a pier for boat moorage, and no attempt has been made to tie a boat to the structure. Water closely approaches the deck level only occasionally in winter at high tide. A railing runs around the entire deck except the landward entry. Uses made of the sundeck do not require a water location.

## XIV

In the main, residential development on the spit preceded the adoption of the Shoreline Management Act (1971) and the PCSMP (1975).

The Gappa house is among those which were built and used for residential purposes years before the current regime of shorelines regulation was created.

## XV

In addition to the Picton deck, there are four other similarly used structures projecting from the west side of the spit. Two of these appear somewhat larger than Picton's, and two are smaller. The latest was built around 1975.

On the record before us, it is not clear which, if any, of these structures received shorelines permits. Some may well be grandfathered as pre-existing uses.

## XVI

The most recent of these other decks lies a few feet from Picton's on the property of the Ceccantis immediately to the north. The Ceccantis do not object to Picton's sundeck.

There is no such structure on the Jones' property immediately to

1 the south. The Jones have lived there since 1954. They do object to  
2 Picton's project.

3 XVII

4 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
5 adopted as such.

6 From these Findings of Fact, the Board makes these

7 CONCLUSIONS OF LAW

8 I

9 By Pre-Hearing Order, dated February 17, 1987, the following  
10 issues were set forth:

11 1. Whether under the Shoreline Management Act  
12 implemented by the Pierce County Master Program,  
13 the sundeck erected by appellant is a prohibited  
use such that no variance may be granted?

14 2. Whether, if a variance can be granted, the  
15 criteria necessary for the granting of a variance  
16 has been satisfied? In particular whether the  
17 appellant can show that the application of the use  
regulations will preclude him from making any  
reasonable use of the property?

18 This statement of issues is controlling and our review is limited to  
19 them. See Kitsap County v. Department of Natural Resources, 99 Wn.2d  
20 386, 662 P.2d 381 (1983).

21 II

22 We conclude that the sundeck is not a "dock" or "pier" as defined  
23 by the master program. PCSMP Sections 65.56.010 (A) and (B). Those  
24 terms refer to structures designed for commercial or recreational uses  
25 which require a water location. See Section 65.56.040(A)(6).

26 FINAL FINDINGS OF FACT  
27 CONCLUSIONS OF LAW AND ORDER (7)  
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III

The PCSMP defines "residential development" to include places of abode "together with accessory uses and structures normally common to residential uses." Section 65.62.010.

We conclude that the sundeck in question is an accessory structure within this definition and, thus, subject to the general requirements of PCSMP Section 65.62.030(A)(5) that "residential structures shall be landward of the extreme high water mark."

The threshold question, therefore, is whether this language is to be construed as an outright prohibition.

IV

Under the Department of Ecology's rules for reviewing variances and conditional uses, the critical distinction is whether a particular provision relates to "specific bulk, dimensional or performance standards" or relates to "varying the use to which a shoreline area is to be put." WAC 173-14-150. A variance may be obtained (subject to rigorous criteria) for a bulk or dimensional standard such as a setback, but a request to vary a use may fall afoul of the rule that "uses which are specifically prohibited by the master program may not be authorized." WAC 173-14-140(3).



In form, the standard established by Section 65.62.030(A)(5) is akin to a setback. It establishes a general residential building limit line at the extreme high water mark.

However, the PCSMP chapter on residential development also contains a separate 50 foot setback from the ordinary high water line for residential "buildings and structures." Section 65.62.050(C). See, Simchuk and Pierce County v. Department of Ecology, SHB No. 84-64 (1985). Millie and Pierce County v. Department of Ecology, SHB No. 86-9 (1986).

To allow a variance to the extreme high water mark limit would, in most instances, still leave one in violation of the 50 foot setback. But it is not reasonable to conclude that the master program requires two variances from two different setbacks for one dimension of a single project. The two limitations must, therefore, be reconciled by some other interpretation.

Usually, the 50 foot setback will provide a margin of dry land between development and the water's edge. As a bulk or dimensional standard, this should be subject to variation on a case-by-case basis. Indeed, special conditional use criteria are established for "any water dependent accessory use" proposed within the 50 foot setback. Section 65.62.050 (D)(2).

Under these circumstances, the scheme of dual limitation makes sense if the extreme high water mark limit is construed as an absolute

1 ban on non-water dependent residential development beyond the water's  
2 edge. The system then becomes one of increasing stringency as one  
3 approaches the water.

#### 4 VI

5 Accordingly, we conclude that the regulatory provision  
6 establishing the extreme high water mark as the general limit for  
7 residential development is an absolute prohibition on non-water  
8 dependent uses seaward of the water's edge. It prohibits  
9 over-the-water residential uses, except those such as piers, docks,  
10 buoys and floats where a water location is clearly required.

#### 11 VII

12 We hold that the sundeck in question is prohibited at its  
13 location by the PCSMP. As noted, the Department of Ecology's rules  
14 prevent the issuance of variances or conditional use permits where the  
15 master program specifically prohibits a use. WAC 173-14-140(3).

16 Ecology's rules on this subject are described as minimums. WAC  
17 173-14-155. No contention has been made that these rules cannot be  
18 applied here. Therefore, we decide that Ecology's denial of the  
19 variance on the basis of its own rule regarding prohibited uses has  
20 not been shown to be in error.

#### 21 VIII

22 Notwithstanding our conclusion of the prohibition issue, we  
23 choose to address the second question regarding variance criteria.

24 The PCSMP section on variances, Section 65.72.020, requires among  
25

1 other things, a showing that if he complies with the provisions of the  
2 master program, the applicant cannot make any reasonable use of the  
3 property. This provision is more restrictive than the requirements of  
4 Ecology's variance and conditional use criteria set forth in WAC  
5 173-14-140 and 150. In such a case, Simchuk, supra, and Strand v.  
6 Snohomish County, SHB 85-4 (1985), establish that the more restrictive  
7 master program provision must be applied.

8 The test is a severe one, particularly difficult to meet when the  
9 proposal is to add something within a generic use category already  
10 established on the property. E.g., Simchuk; Strand; Renkel v. Mason  
11 County, SHB 85-8 (1985). Here we deal with an accessory to a long  
12 established residential use of the Gappa parcel. It is an amenity,  
13 not a necessity for continuance of the reasonable use which has been  
14 ongoing for many years. See Wilson and Mason County v. Department of  
15 Ecology, SHB 85-8 (1986). The project clearly fails to meet the test.

#### 16 IX

17 The development is also inconsistent with the variance criterion,  
18 Section 65.72.020(A), which requires an applicant to show

19 There are conditions or circumstances involved with  
20 the particular project that make strict application  
21 of the regulations unnecessary or unreasonable for  
the applicant's proposal.

22 The situation which the applicant is facing is not particular to him.  
23 Rather, it is the widespread situation of owners in his locale. The  
24 building limit line cannot be relaxed here without the relaxation

1 being equally applicable to virtually all properties on the Day Island  
2 spit. The cumulative impacts would create a situation explicitly  
3 designed against by the master program's provision requiring  
4 residential structures to be landward of the extreme high water mark.  
5

6 X

7 That there are several other similar structures along the west  
8 side of the spit does not alter our views on this case. This Board  
9 was not asked to review any of these projects and expresses no opinion  
10 as to their legality. They do not function as precedents for purposes  
11 of our review in the instant case. Buechel and Mason County v.  
12 Department of Ecology, SHB 85-1 (1985). Our analysis of cumulative  
13 impacts looks forward, not backward.

14 XI

15 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
16 adopted as such.

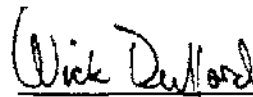
17 From these Conclusions of law, the Board enters the following  
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ORDER

The State Department of Ecology's disapproval of the shorelines variance granted by Pierce County to Harry Picton is hereby affirmed.

DONE at Lacey, Washington, this 23rd day of September, 1988.

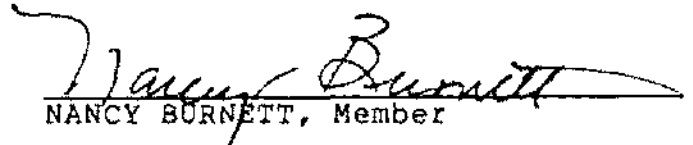
SHORELINES HEARINGS BOARD



WICK DUFFORD, Presiding



JUDITH A. BENDOR, Member



NANCY BURNETT, Member



ANNETTE MC GEE, Member



DENNIS MC LERRAN, Member